Chai Say Fah v Hartawan Aman Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–2772–12 OF 2013
ABDUL WAHAB PATAIL, LINTON ALBERT AND VERNON ONG JJCA
22 APRIL 2015

Civil Procedure — Service — Service of documents — Validity of service — Declaration that sale of land was null and void — Declaration obtained in absence of appellant — Allegation that respondent attempted to serve cause papers but appellant refused — Cause papers placed in letter box — Whether there had been regular service

The appellant appealed against the decision of the High Court dismissing the appellant's application vide encl 14 to set aside the orders made. The respondent had obtained the order against the appellant declaring that the sale of a land to the appellant was null and void. It was obtained in the absence of the appellant on the ground the respondent had attempted to serve the cause papers for the underlying action onto the appellant who had refused to accept service of the same, causing the respondent to place the said cause papers in the letter box outside. The issue concerned whether there had been regular service.

Held, allowing the appeal:

(1) Service, and thereby giving notice to the other party as to what is being relied upon, is the very foundation that enables a party to be heard in his own defence before an order is made against him. Confidence that justice is done on the merits depends upon it. It is not a game of numbers and technicalities. There were more than sufficient grounds to render the orders made unsustainable, and ought to be set aside (see paras 16–17).

(2) Justice requires that litigation is disposed of on the merits of the case, and not on the secondary merits of adherence to provisions of the rules, unless it is demonstrated that the non-compliance is contumelious or has denied the other party from a fair opportunity to defend himself. Delay does not affect a plaintiff as much as he is expected to be ready to prove its case upon a balance of probabilities and must therefore be ready with the evidence, unless of course critical witnesses unexpectedly had passed on (see para 7).

(3) The reasoning that there is no injustice to dismiss the application in encl 14 because an application to reinstate the case could be entertained if encl 14 is dismissed is flawed, for the court could not bind itself to entertain

affirmatively an application it had suggested, unless the parties had been heard. If the court were so minded to allow the other application which was not yet made, then it should allow encl 14 (see para 10).

[Bahasa Malaysia summary

Perayu merayu terhadap keputusan Mahkamah Tinggi menolak permohonan perayu melalui lampiran 14 untuk mengetepikan perintah-perintah yang dibuat. Responden telah memperolehi perintah terhadap perayu mengisytiharkan bahawa jualan tanah kepada perayu adalah batal dan tidak sah. Ia diperolehi dalam ketidakhadiran perayu atas alasan bahawa responden telah mencuba untuk menyerahkan kertas kausa bagi tindakan yang mendasari ke atas perayu yang telah enggan untuk menerima penyerahannya, menyebabkan responden meletakkan kertas kausa tersebut di dalam peti surat di luar. Isu berkenaan adalah sama ada terdapat penyerahan biasa.

Diputuskan, membenarkan rayuan:

(1) Penyerahan, dan dengan itu memberi notis kepada pihak lain terhadap apa yang digunakan, adalah asas yang membolehkan pihak untuk didengar dalam pembelaannya sendiri sebelum perintah dibuat terhadapnya. Keyakinan yang keadilan dilakukan atas merit bergantung ke atasnya. Ia bukan mainan nombor dan teknikal. Terdapat lebih daripada alasan yang mencukupi untuk menyebabkan perintah-perintah menjadi tidak mampan, dan patut diketepikan (lihat perenggan 16–17).

(2) Keadilan memerlukan bahawa litigasi dilepaskan atas merit kes, dan bukan atas merit sekunder pematuhan kepada peruntukan peraturan, kecuali ia ditunjukkan bahawa ketidakpatuhan adalah biadap atau menafikan pihak lagi satu daripada peluang adil untuk membela dirinya. Kelewatan tidak menjejaskan plaintif seperti yang dia jangkakan untuk bersedia membuktikan kesnya atas imbangan kebarangkalian dan oleh itu bersedia dengan keterangan, kecuali jika saksi-saksi penting dengan tidak disangka-sangka telah meninggal dunia (lihat perenggan 7).

(3) Alasan bahawa tidak terdapat ketidakadilan untuk menolak permohonan lampiran 14 kerana permohonan untuk mengembalikan kes tersebut boleh dipenuhi jika lampiran 14 yang ditolak adalah cacat, kerana mahkamah tidak dapat mengikat dirinya sendiri untuk memenuhi secara afirmatif permohonan yang ia cadangkan, kecuali pihak-pihak telah didengar. Jika mahkamah berhasrat untuk membenarkan permohonan lagi satu yang belum dibuat, oleh itu ia patut membenarkan lampiran 14 (lihat perenggan 10).]

Notes

For cases on service of documents, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 8217–8227.

Cases referred to

Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40; [1989] 1 CLJ 1, SC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)

Legislation referred to

Rules of the High Court1980 O 10 rr 1 (4), 6

Appeal from: Originating Summons No 24–1095 of 2002 (High Court, Ipoh).

Gurbacan Singh (Bachan & Kartar) for the appellant.
Dominic Selvam (Rajandran Domnic & Co) for the respondent.

Abdul Wahab Patail JCA:

[1] The second defendant, Chai Say Fah ('the appellant') appealed against the decision of the High Court dismissing the appellant's application vide summons in chambers encl 14 ('encl 14') to set aside the orders made on 15 January 2013, 13 January 2013 and 21 March 2013.

[2] The basis of the reasoning of the High Court is contained in this passage of the grounds of judgment on encl 14:

> B. Keputusan dan Alasan-Alasannya
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> Setelah menyemak dan meneliti kertas-kertas kausa dan mendengar serta menimbangkan hujahan bertulis dan lisan dari peguam kedua-dua pihak, dengan sandaran nas dari keputusan kes-kes Mahkamah yang lebih tinggi, Mahkamah mendapati bahawa perintah-perintah Mahkamah yang dibuat dalam kes ini pada 15 January 2003, 13 January 2003 dan 21 March 2003 adalah yang telah diperoleh secara regular dan telah disempurnakan, malah pertukaran hakmilik tanah berkenaan telah dilakukan kepada pihak-pihak ketiga dan kini tidak lagi berada dalam nama Plaintif.
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> Fakta melalui afidavit menunjukkan alasan permohonan secara asasnya adalah penipuan dan frod terhadap Pemohon (Defendan Kedua) dan Mahkamah.
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> Maka berpandukan nas dari kes Mahkamah Persekutuan *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Berhad* [2013] 5 MLJ 1; [2013] 6 CLJ 673, *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Berhad* [1998] 1 MLJ 393; [1998] 2 CLJ 75 (FC), *Hock Hua Bank Berhad v Sahari Murid* [1981] 1 MLJ 143; [1980]1 LNS 92 *(FC)dan kes Mahkamah Rayuan Tenaga Nasional Berhad v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479; [2000] 1 CLJ 533 (CA), Mahkamah mendapati perintah-perintah tersebut bukanlah illegal yang dibuat dengan

melanggar peruntukan statutori atau yang dibuat di luar bidang kuasa.

[3] The above requires appreciation of:

(a) orders sought under encl 14;

(b) the orders made on 15 January 2013, 13 January 2013 and 21 March 2013;

(c) regularity of the orders made on 15 January 2013, 13 January 2013 and 21 March 2013; and

(d) effect of the properties having been transferred to a third party.

ORDERS SOUGHT UNDER ENCLOSURE 14

[4] By encl 14, the appellant had sought orders as follows:

(a) that the orders made without attendance of the second defendant on 15 January 2003, 13 January 2003, dan 21 March 2003 be set aside;

(b) that the service of encl 14 said to have been served be set aside;

(c) costs to be paid by the plaintiff or the plaintiff's counsel; and

(d) such other orders as the court thinks fit.

THE ORDERS MADE ON 15 JANUARY 2013, 13 JANUARY 2013 AND 21 MARCH 2013

[5] The orders dated 13 January 2003 and 21 March 2003 were ex parte orders. It was submitted that the order of 15 January 2003 was a purported default order.

[6] The law requires that a plaintiff to be prepared to prove his case upon a balance of probabilities. Thus, it has been held by the Supreme Court in *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40; [1989] 1 CLJ 1 SC that:

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the Court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkin stated clearly the principles in which the Court should act in *Evans v Bartlam* [1937] AC 473 at 480 in these words:
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> > ... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.
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> In the instant case, the learned Judge did not consider the judgment to be irregular.

Mallal's Supreme Court Practice, 2nd Ed, Vol I at p 84 explains the position where the judgment is regular thus:

> The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits, or for some very sufficient reason: *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1978] 1 LNS 15; *Farden v Richter* [1889] 23 QBD 124.
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> A defence on the merits means merely raising only an arguable or triable issue, e.g. contributory negligence in a running down case in White v Weston [1968] 2 QB 647. A judgment in default is not a judgment on the merits: *L Oppenheim And Company v Mahomed Haneef* [1922] 1 AC 482.
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> As to delay there is no rigid rule that an applicant must satisfy Court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously, the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising discretion. Clearly, the application should be made promptly and within a reasonable time. But the Court will in a fit case disregard lapse of time: *Beale v Mac Gregor* [1886] 2 TLR 311.

[7] Nothing much more need to be added to the above exposition. Justice requires that litigation is disposed off on the merits of the case, and not on the secondary merits of adherence to provisions of the rules, unless it is demonstrated that the non-compliance is contumelious or has denied the other party from a fair opportunity to defend himself. Delay does not affect a plaintiff as much as he is expected to be ready to prove its case upon a balance of probabilities and must therefore be ready with the evidence, unless of course critical witnesses unexpectedly had passed on.

[8] Whether to set aside the orders so obtained as in this case is very much an exercise of judicial discretion to ensure that the litigation is heard upon its merits, for only by getting the facts right and applying the law thereon can justice unquestionably be done. That is justice of the first order. Whereas an order obtained on technical grounds remains a match call, with the justice on the merits of the litigation being debateable. This latter is justice of the second order. If justice of the first order remains capable of being achieved and the delay capable of being remedied by an order of costs, then justice of the second order cannot stand in its way.

[9] In this case, the reasoning by the High Court is as follows:

> B. Keputusan dan Alasan-Alasannya
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> Setelah menyemak dan meneliti kertas-kertas kausa dan mendengar serta menimbangkan hujahan bertulis dan lisan dari peguam kedua-dua pihak, dengan sandaran nas dari keputusan kes-kes Mahkamah yang lebih tinggi, Mahkamah mendapati bahawa perintah-perintah Mahkamah yang dibuat dalam kes ini pada 15 January 2003,13 January 2003 dan 21 March 2003 adalah yang telah diperoleh

secara regular dan telah disempurnakan, malah pertukaran hak milik tanah berkenaan telah dilakukan kepada pihak-pihak ketiga dan kini tidak lagi berada dalam nama Plaintif.

Fakta melalui afidavit menunjukkan alasan permohonan secara asasnya adalah penipuan dan frod terhadap Pemohon (Defendan Kedua) dan Mahkamah.

Maka berpandukan nas dari kes Mahkamah Persekutuan *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Berhad* [2013] 6 CLJ 673, *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Berhad* [1998] 2 CLJ 75 FC, *Hock Hua Bank Berhad v Sahari Murid* [1981] 1 MLJ 143; [1980]1 LNS 92 FC dan kes Mahkamah Rayuan *Tenaga Nasional Berhad v Prorak Sdn Bhd & Anor* [2000] 1 CLJ 533 CA, Mahkamah mendapati perintah-perintah tersebut bukanlah illegal yang dibuat dengan melanggar peruntukan statutori atau yang dibuat di luar bidang kuasa.

Apa yang diharapkan oleh Defendan Kedua daripada Mahkamah dalam permohonan ini, bukan sekadar untuk Mahkamah ini melaksanakan kuasa sedia ada membatalkan perintah cacat yang dibuat terdahulu yang termasuk di bawah pengecualian seperti dalam kes Badiaddin. Dengan kata lain, perintah yang dipohon bukan sekadar untuk mengenepikan irregular judgment, tetapi untuk membatalkan perintah (yang dibuat oleh Mahkamah dalam bidang kuasa yang sama) atas dasar dan alasan frod terhadap Mahkamah sendiri dan juga terhadap Pemohon (Defendan Kedua).

Justeru, berdasarkan nas kes Serac Asia (yang mengikat Mahkamah ini) untuk mendapatkan perintah-perintah seperti dipohon, Defendan Kedua wajar memohonnya melalui writ saman yang khusus untuk tujuan tersebut.

Lagipun, dengan adanya perintah Mahkamah dalam kes 22-102-04 (eksibit LBC-4 Afidavit Lampiran 17) bertarikh 11 November 11 yang membolehkan Pemohon menghidupkan semula kes tersebut (jika permohonan ini ditolak), pihak Pemohon tidak diprejudiskan jika Mahkamah ini menolak permohonan ini.

Maka dengan itu, permohonan Defendan Kedua Lampiran 14 ditolak dengan kos RM3,000 (yang dipersetujui oleh kedua-dua pihak).

[10] It struck us that the reasoning that there is no injustice to dismiss the application in encl 14 because an application to reinstate the case can be entertained if encl 14 is dismissed is flawed, for the court cannot bind itself to entertain affirmatively an application it had suggested, unless the parties had been heard thereon. If the court were so minded to allow the other application which was not yet made, then it should allow encl 14.

[11] The grounds itself is an outline of the findings made that led to the decision:

(a) on the basis of the cause papers, the oral and written submissions and relying on the authorities the court found that the orders made on 15 January 2003, 13 January 2003 and 21 March 2003 have been regularly obtained and executed, and titles to land had been transferred to third

parties and no longer in the name of the plaintiff;

(b) the facts relied upon in the affidavits were of cheating and fraud, against the appellant and the court;

(c) based on the authorities the court found the orders were not illegal as being contrary to statutory provisions made outside the jurisdiction of the court;

(d) relying on Serac, the appellant must apply for the orders being sought by specific writ for the purpose;

(e) the order in case 22–102–04 enables the appellant to apply to reinstate the case in case encl 14 is dismissed and therefore the appellant is not prejudiced; and

(f) the court therefore dismissed encl 14 by the second defendant with costs RM3,000.

[12] The grounds lacked the reasoning for the findings that formed the foundation for the dismissal.

[13] The background facts may be summarised as follows:

(a) by an originating summons vide OS No 24–1095 of 2002 filed on 8 November 2002 the plaintiff Hartawan Aman Sdn Bhd ('the respondent') obtained the order of 15 January 2003 against the appellant declaring that the sale of the said land to the appellant was null and void. It was obtained in the absence of the appellant on the ground the respondent had attempted to serve the cause papers for the underlying action onto the appellant who had refused to accept service of the same, causing the respondent to place the said cause papers in the letter box outside.

(b) the order of 13 January 2003 allowed the application by the respondent by an ex parte summons in chambers OS No 24–1095 of 2002 dated 8 November 2002, the respondent sought an order that an unstamped trust deed dated 07 July 1997 between the respondent and one Chong Fee Meng be stamped and be treated as the original copy of the said deed, and to used as the original copy of the same to base the respondent's claim in OS No 24–1095 of 2002, that Chong Fee Meng purchased the said property on trust for the respondent. It was alleged there was a conspiracy between the respondent and Chong Fee Meng, with no particulars in support of the same other than that the property had been sold below the market price under the sales and purchase agreement dated 30 October 1998. The affidavit averring this fact at encl 6 was not served on the respondent. Further, encl 7, an affidavit correcting an error in reference to the lot number of the property, was not served on the appellant.

(c) by the order of 21 March 2003, the High Court allowed an amendment sought by summons in chambers at encl 12 to amend the 15 January 2003 order in that the party named in the order be 'UPTREND PLACE SDN BHD', when encl 12 was not served upon the appellant.

[14] The issue concerns whether there had been regular service. Only if service has been otherwise regular, then only the considerations in *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 and *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Berhad* [2013] 5 MLJ 1; [2013] 6 CLJ 673 become applicable. The affidavit of service did not state the day of the week and date on which it was served. The said process server was from the firm of the solicitors acting for the respondent, where the solicitor handling the encl 14 was charged at the Sessions Court Penang for fraud and perjury involving a plot of land in Penang and was convicted and sentenced to 40 months imprisonment and was struck off. The challenge as to whether the service was in compliance with O 10 r 1 (4) and O 10 r 6 of the Rules of the High Court 1980 was certainly raised arguable or triable issues.

[15] It was submitted for the respondent that:

(a) the appeal does not contain the relevant originating summons and the Court of Appeal is at a disadvantage;

(b) the cause papers were served on the appellant;

(c) the memorandum of appeal did not say that the High Court erred as to service;

(d) there were concurrent findings by the two High Court judges that the service was good.

[16] With respect, service, and thereby giving notice to the other party as to what is being relied upon, is the very foundation that enables a party to be heard in his own defence before an order is made against him. Confidence that justice is done on the merits depends upon it. It is not a game of numbers and technicalities.

[17] We concluded from the above there are more than sufficient grounds to render the orders made on 15 January 2003, 13 January 2003 and 21 March 2003 unsustainable, and ought to be set aside.

[18] We therefore allowed the appeal, entered judgment in terms of payers (a) and (b) of encl 14, fixed costs in the sum of RM10,000 and ordered that the deposit be refunded.

A *Appeal allowed.*

Reported by Afiq Mohamad Noor

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